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Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 1816

MAROCEANO COMPANIA NAVIERA S.A.
as Owner of S.T. PENTELIKON,

Respondent,

—against—

S.S. VERDI, her engines, etc., and
ITALIA SOCIETA DI NAVIGAZIONE (ITALIAN LINE),

Petitioner.

ITALIA SOCIETA DI NAVIGAZIONE (ITALIAN LINE),
as Owner of S.S. VERDI,

Petitioner,

—against—

S.T. PENTELIKON, her engines, etc., and
MAROCEANO COMPANIA NAVIERA S.A.,

Respondent.

APPENDIX TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Opinion of District Court

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

MAROCEANO COMPANIA NAVIERA, S.A.,
as Owner of the S.T. PENTELIKON,

Plaintiff,

—against—

S.S. VERDI, her engines, boilers, etc. and
ITALIA SOCIETA DI NAVIGAZIONE,

Defendants.

ITALIA SOCIETA DI NAVIGAZIONE
as Owner of the S.S. VERDI,

Plaintiff,

—against—

S.T. PENTELIKON, her engines, boilers, etc., and
MAROCEANO COMPANIA NAVIERA, S.A.,

Defendants.

CANNELLA, *J.*

These consolidated actions arise out of the collision on April 16, 1964 of the S.T. Pentelikon and the S.S. Verdi in the Strait of Gibraltar near Tarifa. Each vessel brought suit against the other, alleging the other to be solely at fault. The Verdi subsequently admitted fault on her part and the only issue presently before this court is the fault

of the Pentelikon.[1] The court finds that the Pentelikon was equally at fault for the collision along with the Verdi and thus orders that the damages be divided.

The court has jurisdiction over this admiralty action pursuant to 28 U.S.C. § 1333.

The S.T. Pentelikon, a single screw super-tanker some 725′-08″ in overall length and 92′-06″ in breadth, is owned by Maroceano Compania Naviera, S.A., a Panamanian corporation. The S.S. Verdi is a twin screw passenger-cargo vessel some 528′-06″ in overall length and 69′-04″ in breadth owned by Italia Societa Di Navigazione, an Italian corporation.

The parties agree as to most of the facts which surround the collision, but differ substantially as to their appraisal of the Pentelikon's actions. Under the brilliant ray of considered hindsight, counsel for each party has laid before the court a superb analysis of what action each vessel *should* have taken. Unfortunately, the masters of these two vessels did not have their able counsels' assistance available to them on the night of April 16, 1964. The weather that night was clear, visibility was good, and an East Southeast wind of Beaufort force 3-5 was blowing.[2]

The Pentelikon was eastbound from the Atlantic Ocean, having changed course from 113° to 087° at 2345 hours (April 15) and to 090° at 0010 hours (April 16).[3] Her speed over the ground was somewhere in the area of 13 knots since her progress was being retarded by the wind

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[1] See Pre-Trial Order, filed Feb. 1, 1968. The parties stipulated that the issue of damages would be tried separately or submitted to a special master; however, for the purposes of this action, there was admittedly damage sustained to both vessels.

[2] Pre-Trial Order, p. 3.

[3] Trial Minutes, pp. 87, 100, 172-73, 385.

effect on her large sail area and the current.[4] This court finds that the Pentelikon, after having sighted the Verdi, maintained her course of 090° up until the time she was *in extremis* as was required of her by the International Rules of the Road, Rule 21.[5] The Verdi argues that the Pentelikon changed course; however, all the crew present on the bridge of the Pentelikon testified that she maintained a constant course of 090°. Although this cannot be absolutely substantiated since the Pentelikon did not have a working course recorder, the court believes the Pentelikon's witnesses in this regard. In addition, the Pentelikon also maintained her speed as required by Rule 21 until the point of *in extremis*. The Pentelikon's master, Nicolaos Hazapis, estimates that he first sighted the Verdi at 0135 hours[6] and that her course according to a bearing taken with a "seaman's eye" was in a southerly direction. No accurate bearing by pelorus or radar was taken by the master or crew, rather Captain Hazapis was content to rely on his estimate. The courses of the two vessels were such that there was a crossing situation with the Pentelikon the privileged vessel. Rule 19 of the International Rules of the Road states: "When two power driven vessels are crossing, so as to involve risk of collision, the vessel which has the other on her own starboard side shall keep out of the way of the other." The bearing of the Verdi did not significantly change, except perhaps during her ma-

[4] Trial Minutes, pp. 200, 393, 430-35; Exhibit 7.

[5] Rule 21 provides: "Where by any of these Rules one of two vessels is to keep out of the way, the other shall keep her course and speed. When, from any cause, the latter vessel finds herself so close that collision cannot be avoided by the action of the giving-way vessel alone, she also shall take such action as will best aid to avert collision."

[6] Trial Minutes, pp. 187-90.

neuvers to avoid a third vessel, and thus there was certainly a danger of collision present.[7] Therefore, Captain Hazapis flashed the letter "U" by International Morse Code[8] on the blinker light since it was night-time. When no action was taken by the Verdi, the letter "U" was again flashed and the Danger Signal pursuant to Rule 28(b) of the International Rules of the Road[9] was sounded on the ship's whistle. Several minutes later, Captain Hazapis ordered "Hard to Starboard" and rang down emergency astern on the telegraph; that is, he rang full astern twice. Nevertheless, the collision occurred, and the Verdi's bow struck the Pentelikon's port side amidships causing extensive damage to both vessels.

Meanwhile, the Verdi, which had been proceeding westward on a course of 242° after passing abeam of Tarifa Cape Light[10] at 0202 hours,[11] sighted two vessels approxi-

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[7] The "Preliminary" statements under Part D—Steering and Sailing Rules—of the International Rules of the Road, subpart 2 states: "Risk of collision can, when circumstances permit, be ascertained by carefully watching the compass bearing of an approaching vessel. If the bearing does not appreciably change, such risk should be deemed to exist."

[8] The letter "U" when sent as a single letter has the meaning under the International Code of Signals of "You are standing into danger." See Int'l Code of Signals, H.O. 103.

[9] Rule 28(b) provides that: Whenever a power-driven vessel which, under these Rules, is to keep her course and speed, is in sight of another vessel and is in doubt whether sufficient action is being taken by the other vessel to avert collision, she may indicate such doubt by giving at least five short and rapid blasts on the whistle. The giving of such a signal shall not relieve a vessel of her obligations under Rules 27 and 29 or any other Rule, or of her duty to indicate any action taken under these Rules by giving the appropriate sound signals laid down in this Rule.

[10] See Exhibit 17.

[11] The times between the two vessels vary materially. No attempt has been made to correct one, or both, to a standard time,

mately eight minutes later—the Pentelikon and another vessel which was never identified [hereinafter "UNO" (Unidentified Navigating Object)]. The Verdi determined that the Pentelikon's bearing was broadening and therefore concerned herself with the UNO. Thus, the Verdi change course to 257° to pass astern of UNO, and after doing so, she again altered course—back to her base course of 242°.[12] At this time, the Verdi's master, Giovanni Peranovich, became concerned with the Pentelikon and the risk of collision. See Int'l Rules of the Road, Part D—Steering and Sailing Rules, Preliminary 1 & 2. Since the Verdi was the burdened vessel under the Crossing Rule (Rule 19), she should have taken early action to avoid the Pentelikon,[13] slackened her speed, stopped, or reversed,[14] or taken other action to avoid the collision or crossing ahead of the Pentelikon. She did none of these things. Because of these errors, and others, including her failure to sound course changes on the ship's whistle,[15] the Verdi has prudently admitted liability. The Verdi was also at fault for turning to port in her last maneuver and thus tending to

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but rather each vessel's action is given in its own time. The Verdi's collision time is 0220 hours, whereas the Pentelikon's is 0143 hours. No purpose is served by a correction as long as one is aware of the difference.

[12] Trial Minutes, pp. 62-64, 285-86.

[13] See Int'l Rules of the Road, Part D, Preliminary 1. Rule 22 states: "Every vessel which is directed by these Rules to keep out of the way of another vessel shall, so far as possible, take positive early action to comply with this obligation, and shall, if the circumstances of the case admit, avoid crossing ahead of the other."

[14] Rule 23 states: "Every power-driven vessel which is directed by these Rules to keep out of the way of another vessel shall, on approaching her, if necessary, slacken her speed or stop or reverse."

[15] Rule 28(a) provides for the proper whistle signals upon execution of a course change.

cross ahead of the Pentelikon[16] instead of turning to starboard, which would have tended to have her pass astern of the Pentelikon. However, this maneuver may be excusable in view of the fact that the vessels at that time were *in extremis*.

Although it is thus apparent that this collision might have been avoided had the Verdi taken the action required of her, this does not necessarily mean that the Pentelikon was without fault. The Verdi has done more than just raise a doubt as to the fault of the Pentelikon; rather, it has proven by clear and convincing evidence the Pentelikon's contributory fault. See United States v. S.S. Soya Atlantic, 213 F. Supp. 7 (D. Md. 1963), aff'd, 330 F.2d 732 (4th Cir. 1964). Cf. The City of New York, 147 U.S. 72, 84-5 (1892). Furthermore, the logic of the *Pennsylvania* Rule is applicable here. When there is a violation of a rule which is designed to prevent collisions, the violator must show not only that her violation "might not have been one of the causes, or that it probably was not, but that it could not have been" a contributory factor to the collision. The Pennsylvania, 86 U.S. (19 Wall.) 125, 136 (1873). See, e.g., Anglo-Saxon Petroleum Co. v. United States, 222 F.2d 75, 77 (2d Cir. 1955).

The Verdi contends that the Pentelikon was at fault in a number of ways. One of these, namely, that the Pentelikon altered her course while she was privileged and thus under a duty to hold her course and speed, is essentially a question of fact which has already been resolved by this court's finding that no such course change

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[16] See Rule 22; Sawyer v. McDonald, 165 F.2d 426 (5th Cir. 1948).

occurred until the *in extremis* point was reached.[17] The Pentelikon did no more than follow the statutory command of Rule 21. See, e.g., Skibs Aktieselskapet Orenor v. The Audrey, 181 F. Supp. 697, 701-02 (E.D. Va. 1960), aff'd, 287 F.2d 706 (4th Cir. 1961). Likewise, the Pentelikon was required to, and did, maintain her speed till *in extremis*. The Britannia, 153 U.S. 130 (1893); Zim Israel Navigation Co. v. S.S. American Press, 222 F. Supp. 947 (S.D.N.Y. 1963), aff'd, 336 F.2d 150 (2d Cir. 1964), cert. denied, 380 U.S. 954 (1964). However, this does not mean that the Pentelikon could hold her course and speed all the way into collision. At some point in time—the *in extremis* point—the privileged vessel is duty bound under the General Prudential[18] and the Good Seamanship[19] Rules to take some affirmative action toward avoidance of the collision. Postal S.S. Corp. v. El Isleo, 308 U.S. 378, 386-387 (1939); Sawyer v. McDonald, 165 F.2d 426, 429 (5th Cir. 1948); Kinsman Transit Co. v. U.S. Steel Corp., 141 F. Supp. 815, 817 (N.D. Ohio 1956); Standard Oil of N.J. v. United States, 92 F. Supp. 696 (S.D.N.Y., 1950). The rub here is in determining when the *in extremis* point was reached. There are no mathematical formulas to be applied and no visible

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[17] The finding that no course change occurred renders the alleged failure to give a whistle signal for it moot.

[18] Rule 27 provides: "In obeying and construing these Rules due regard shall be had to all dangers of navigation and collision, and to any special circumstances, including the limitations of the craft involved, which may render a departure from the above Rules necessary in order to avoid immediate danger."

[19] Rule 29 provides: "Nothing in these Rules shall exonerate any vessel, or the owner, master or crew thereof, from the consequences of any neglect to carry lights or signals, or of any neglect to keep a proper look-out, or of the neglect of any precaution which may be required by the ordinary practice of seamen, or by the special circumstances of the case." See also Rule 21.

lines drawn on the water's surface; rather, the point is one of reasoned and considered judgment taking into account the dictates of good seamanship. The Gulfstar, 136 F.2d 461, 464 (3d Cir. 1943). After considering the closeness of the vessels at the time, the obvious inaction of the Verdi, and the overall circumstances and conditions, the court finds that the master of the Pentelikon should have taken action immediately after he gave the second "U" signal and blew the danger signal, since his vessel was *in extremis* at that time. By failing to take such affirmative action, the Pentelikon was at fault in this regard unless she can justify her conduct. See Postal S.S. Corp. v. El Isleo, *supra;* Kinsman Transit Co. v. U.S. Steel Corp., *supra*. The Pentelikon has failed to justify her conduct of inaction or to show in any way that it could not have contributed to the collision. The Pennsylvania, *supra;* States S.S. Co. v. Permanente S.S. Corp., 231 F.2d 82, 87 (9th Cir. 1956). In fact, it is obvious that the failure to take action on the part of the Pentelikon was a significant factor in this collision.

The Verdi also alleges that the Pentelikon was at fault for failing to have an operable course recorder; for failing to have utilized the radar on board; for failing to have ascertained the Verdi's course and speed by taking bearings of her or in any other manner; and for failing to have a constant lookout on duty during and prior to the collision.

The failure to provide an operable course recorder in this case could not have been the proximate cause of the collision or have contributed to it in any manner. There was no proof presented at trial that a course recorder is required equipment under either foreign or international

regulations.[20] The course recorder does not in any way aid in the navigation of a vessel; rather it shows *ex post facto* what a vessel has done.

A lookout is required by both the International Rules of the Road[21] and by good seamanship. The failure to have one can at times be a fault and the cause of a collision, especially if there is no knowledge of the other vessel. See, e.g., The Colorado, 91 U.S. 692, 699 (1875); United States v. S.S. Soya Atlantic, *supra*. However, here the vessels had sighted each other and the function of a lookout was therefore *not* required. Although the Pentelikon's lookout did leave the wing of the bridge and go below for coffee, the court finds that this could not have been a proximate or contributing cause of this collision. The Victory & Plymothian, 168 U.S. 410, 429 (1897); Albatross Tanker Corp. v. S.S. Amoco Delaware, 415 F.2d 692, 694 (2d Cir. 1969); Skibs Aktiesolskapet Orenor v. The Audrey, 181 F. Supp. at 703; Oliver J. Olson & Co. v. The Marine Leopard, 152 F. Supp. 197, 204 (N.D. Calif. 1957), aff'd, 279 F.2d 662 (9th Cir. 1960), cert. denied, 364 U.S. 881 (1960).

As for the failure of the Pentelikon to utilize her radar to obtain information regarding the Verdi, prudence and good seamanship would dictate its use. See Oliver J. Olson & Co. v. The Marine Leopard, 152 F. Supp. at 206. The utility of such a major navigational aid in the prevention of collisions cannot be doubted. It can be of use not only to ascertain the presence of another vessel, but also to establish her course, speed and distance. The failure to utilize radar in an area of heavy traffic such as

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[20] Foreign ships are not required to comply with domestic U.S. Coast Guard Regulations. See Trial Minutes, p. 590.

[21] Rule 29.

the Strait of Gibraltar, when a vessel is so equipped, constitutes fault which the court finds contributed in this case to the collision. Afran Transport Co. v. The Bergechief, 274 F.2d 469, 473-75 (2d Cir. 1960); The T. J. Hooper, 60 F.2d 737 (2d Cir. 1932); Continental Oil Co. v. M. S. Glenville, 210 F. Supp. 805 (S.D. Tex. 1962). The Pentelikon failed to carry her burden of proving that the failure to utilize the radar here did not contribute to the collision. See Afran Transport Co. v. The Bergechief, 274 F.2d at 473.

The Pentelikon was thus at fault herein for not having taken affirmative action once the *in extremis* point was reached and for not having utilized her radar or in any other manner accurately ascertained the bearing, course and speed of the Verdi. Since the Verdi has admitted fault and the court has found that the Pentelikon was also at fault, the damages must be divided.

The Verdi seeks interest and costs to the exclusion of the Pentelikon. Such an award is in the court's discretion.[22] The court finds that the usual rule for division of costs should be followed here. Likewise, any interest due Verdi should run from the date of the filing of this opinion. Of course, any computation of the amount of interest due, if any, will have to abide the event of the trial or settlement of the damages.

All motions upon which decision was reserved at trial are denied. The foregoing shall constitute the court's findings of fact and conclusions of law pursuant to Rule 52(a) of the Federal Rules of Civil Procedure.

It is ordered that both the Verdi and the Pentelikon be adjudged equally at fault for the collision; that the

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[22] Skibs A/S Siljestad v. S.S. Matthew Luckenbach, 324 F.2d 563, 564 (2d Cir. 1963).

damages be divided accordingly; that costs be divided equally; and that the Verdi have interest on any amount due her from the date of the filing of this opinion.

A hearing may be noticed to determine the amount of damages unless a showing is made that exceptional circumstances warrant the reference to a Special Master. Fed. R. Civ. P., Rule 53(b).

Settle an appropriate order in accordance with the foregoing.

So ordered.

Dated: New York, N. Y.
May 8, 1970.

JOHN M. CANNELLA
U.S.D.J.

Opinion of Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Nos. 396-97—September Term, 1970.

(Argued January 7, 1971 Decided February 8, 1971.)

Docket Nos. 35106, 35202

MAROCEANO COMPANIA NAVIERA S.A.
as Owner of S. T. PENTELIKON,

Plaintiff-Appellant,

—against—

S.S. VERDI, her engines, etc., ITALIA SOCIETA DI NAVIGAZIONE (ITALIAN LINE),

Defendant-Appellee.

S.S. VERDI, her engines, etc., ITALIA SOCIETA DI NAVIGAZIONE (ITALIAN LINE),

Plaintiff-Appellant,

—against—

MAROCEANO COMPANIA NAVIERA S.A.
as Owner of S. T. PENTELIKON,

Defendant-Appellee.

Before:

LUMBARD, *Chief Judge;*
MOORE and SMITH, *Circuit Judges.*

Appeal by Maroceano Compania Naviera S.A. as Owner of the S. T. Pentelikon from an interlocutory decree, John M. Cannella, *Judge,* holding the Pentelikon and the S.S. Verdi owned by Italia Societa di Navigazione equally at fault, and dividing equally the damages sustained as the result of a collision. The Verdi appealed from a failure to award pre-judgment interest against the Pentelikon.

The decree holding the vessels equally liable is reversed, and a decree holding the Verdi solely liable should be entered with costs to appellant Pentelikon; appeal as to pre-judgment interest dismissed as moot. Remanded for further proceedings.

NICHOLAS J. HEALY, New York, N. Y. (Healy & Baillie, New York, N. Y., Allan A. Baillie and John C. Koster, New York, N. Y., of counsel), *for Maroceano Compania Naviera S.A. as Owner of S. T. Pentelikon.*

EUGENE UNDERWOOD, New York, N. Y. (Burlingham Underwood Wright White & Lord, New York, N. Y., Kenneth H. Volk and Frank L. Wiswall, Jr., New York, N. Y., of counsel), *for Italian Line and the S.S. Verdi, her engines, etc.*

MOORE, *Circuit Judge*:

These consolidated actions arise out of a collision in the early morning of April 16, 1964 between the "Pentelikon," a single screw steam turbine driven oil tanker owned by Maroceano Compania Naviera S.A., and the "Verdi," a twin screw passenger and freight vessel owned by Italia Societa di Navigazione. The parties will be designated by the names of the vessels owned by them, respectively. The trial court found both vessels equally at fault and held that damages and costs be divided equally. The Verdi was awarded interest at 6% from May 8, 1970. From this judgment the Pentelikon appeals, claiming that the Verdi was solely at fault. The Verdi seeks to modify the judgment by claiming pre-judgment interest. The pre-trial order narrowed the issues in that the Verdi admitted fault but asserted that the Pentelikon was also at fault.

On the night (April 15-16, 1964) the Pentelikon was proceeding in an easterly direction (course 090) through the Strait of Gibraltar towards the Mediterranean Sea, her speed over the ground was approximately 13 knots. The Verdi was headed for the Atlantic Ocean in a southwesterly direction (course 242) at a speed through the water of some 17 knots. The weather was clear and the visibility good. The Pentelikon sighted the Verdi at 0135 hours. As the Trial Court found, "The courses of the two vessels were such that there was a crossing situation with the Pentelikon the privileged vessel." The Pentelikon "after having sighted the Verdi, maintained her course of 090 up until the time she was *in extremis* as was required of her by the International Rules of the Road, Rule 21.", namely, where "one of two vessels [here the burdened vessel Verdi] is to keep out of the way, the other [Pen-

telikon] shall keep her course and speed." Thus the Pentelikon properly conformed to the navigational rule she was required to follow.

While the Pentelikon was thus proceeding, the master of the Verdi "became concerned with the Pentelikon and the risk of collision." "Since the Verdi was the burdened vessel under the Crossing Rule (Rule 19), she should have taken early action to avoid the Pentelikon, slackened her speed, stopped, or reversed, or taken other action to avoid the collision or crossing ahead of the Pentelikon. She did none of these things."[1]

As the vessels approached each other, the Pentelikon flashed a "U" signal, meaning, "You are standing into danger."[2] No action having been taken by the Verdi, a second "U" signal was flashed and the danger warning was sounded on the Pentelikon's whistle. The vessels were then *in extremis* and the Pentelikon took affirmative action to avoid a collision by turning to starboard and by ringing down full speed astern.

Even then "this collision might have been avoided had the Verdi taken the action required of her." However, she did not. Instead she compounded her faulty navigation. As the Trial Court found, "The Verdi was also at fault for turning to port in her last maneuver and thus tending to cross ahead of the Pentelikon instead of turning to starboard, which would have tended to have her pass astern of the Pentelikon."

In the face of such overwhelming proof that the Verdi's actions were the cause of the collision, upon what grounds did the Trial Court rest its conclusion of equal liability?

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[1] Quotations from Trial Court's findings in opinion.

[2] International Code of Signals, H.O. 103.

The Trial Court held that when the *in extremis* point was reached, the Pentelikon was obliged "to take some affirmative action toward avoidance of the collision." But if this were her duty, she satisfied it by veering off to starboard and reversing her engines, whereas the Verdi, which could have avoided a collision, took affirmative action by turning in the wrong direction, thus colliding with the Pentelikon. The Trial Court found that the Pentelikon should have taken action after she had blown the danger signal but she had every right to expect that the Verdi would heed the danger signal and maneuver properly. Nothing that the Pentelikon could have done could have avoided the collision in the light of the Verdi's unexpected turn to port. The Trial Court speaks of the Pentelikon's failure "to justify her conduct of inaction" but, first, there was no inaction and, second, the burden of justification was not on the privileged vessel.

The Trial Court also found the Pentelikon at fault for not using its radar. Radar is a useful electronic device for detecting the presence, and plotting the course, of other vessels, particularly in a fog or in weather reducing visibility but on a clear night with high visibility it would not have been superior to, or even effective as, the human eye. The master of the Pentelikon had the Verdi under observation and in plain sight for some time. Radar could not have given him the position of the Verdi more accurately (if as accurately) as he from his position on the bridge could determine it. In fact had he left the bridge to observe through a radar what he had been observing over the last many minutes before the collision, he might well have been charged with negligence. There was no causal connection whatsoever between the failure to ob-

serve the Verdi through a radar screen rather than by visual sighting and the collision. See *White Stack Towing Corp.*, 279 F.2d 419 (4th Cir. 1960).

The Trial Court in proper recognition of the role which hindsight plays in these collision cases said that it was unfortunate that "the masters of these two vessels did not have their able counsels' assistance available to them on the night of April 16, 1964." Equally unfortunate was the lack of a library of this Circuit's decisions available on the bridge because counsel for the Verdi could have read to the master from this Court's decisions in *Hellenic Lines* v. *The Exmouth*, 253 F.2d 473 (2d Cir. 1958), *cert. denied*, 356 U.S. 967 (1958) and *Northern Petroleum Tank S.S. Co.* v. *City of New York*, 282 F.2d 120 (2d Cir. 1960). By coincidence, the factual situations in both cases were almost identical to the present case. In both cases the trial court held each vessel to have been at fault and in each case this court reversed the finding of equal liability.

In *Northern Petroleum* this court said as to the "Tynefield" [corresponding to the "Pentelikon" here]:

> "* * * The entire purpose of any navigational rule is to create as much certainty as possible so that each vessel can conduct itself accordingly. The Tynefield had a right (even a duty as well) to maintain its course until collision appeared likely. The Dongan Hills was under an obligation to avoid a collision by obeying the rule and the Tynefield had a right to expect that she would do so. * * *
>
> "In view of this long recognized navigational rule and the importance of strict adherence thereto, the trial court's conclusions that 'Regardless of the right and privilege of the Tynefield to maintain her course and

> speed there was a continuing duty on her part to exercise care to avoid collision until the crossing was safely effected'; that the Tynefield 'failed to change her course and speed until too late'; and 'took no precaution to avoid the impending collision until it was too late, relying recklessly on its privilege in this crossing situation' are not in accord with the law. It was not reckless for the Tynefield to rely on its privilege. To the contrary she was obliged under the Rule to maintain her course (The Delaware, 1896, 161 U.S. 459, 16 S. Ct. 516, 40 L. Ed. 881). She cannot be charged with any failure to change her speed and course when to have done so would have violated the Rule. Nor did she have any reason to believe that the Dongan Hills would not comply with the Rule. It was the Dongan Hills' duty to change her course and speed (if necessary) to avoid collision, * * *."

In the *Hellenic Lines* case, the Hellenic (Pentelikon) and the Exmouth (Verdi) sighted each other at some distance on a clear night. The Hellenic was the privileged vessel and held her course to almost the last minute as here. She gave proper whistle signals and finally the danger alarm, then turned hard right and reversed—all as did the Pentelikon. There, too, was involved a reversal of the trial court's finding of equal liability and a holding by this court of sole liability on the part of the Exmouth.

The Trial Court's conclusion of the Pentelikon's fault *in extremis* is also inconsistent with this Court's decision in *The Stifinder*, 275 F. 271 (2d Cir. 1921), where the Court said:

"The Stifinder's duty was to keep her course and speed in the expectation that the Selje would obey the law and keep out of the way. When it became apparent that the steamer did not intend to conform to the law, the vessels were then in extremis, and what was done or omitted to be done by The Stifinder in the agony of collision can make no difference, as it is impossible to consider a decision so made as a fault. * * * "

If, as the Trial Court here indicated, the Verdi's action in turning to port instead of to starboard (the actual cause of the collision) "may be excusable in view of the fact that the vessels at that time were *in extremis,*" so much the more were the Pentelikon's actions when this point was reached.

Upon the law and the facts, the court concludes that the Verdi was solely at fault. The decree appealed from is reversed with costs with the question of damages and the proceedings for the ascertainment thereof to be decided by the Trial Court. The appeal as to pre-judgment interest is dismissed.

Judgment of Court of Appeals on Merits

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the eighth day of February one thousand nine hundred and seventy-one.

Present:

HON. J. EDWARD LUMBARD,

Chief Judge,

HON. LEONARD P. MOORE,
HON. J. JOSEPH SMITH,

Circuit Judges.

MAROCEANO COMPANIA NAVIERA, S.A.,
as Owner of the S.T. PENTELIKON,

Plaintiff-Appellant,

—v.—

S.S. VERDI, her engines, boilers, etc., and
ITALIA SOCIETA DI NAVIGAZIONE,

Defendants-Appellants.

ITALIA SOCIETA DI NAVIGAZIONE,
as Owner of the S.S. VERDI,

Plaintiff-Appellant,

—v.—

S.T. PENTELIKON, her engines, boilers, etc., and
MAROCEANO COMPANIA NAVIERA, S.A.,

Defendants-Appellants.

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is reversed and that the action be and it hereby is remanded for further proceedings with costs to be taxed against the appellee, S.S. Verdi, etc. (Italian Line), in accordance with the opinion of this court.

A. DANIEL FUSARO
Clerk

Judgment of Court of Appeals as to Prejudgment Interest

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the eighth day of February one thousand nine hundred and seventy-one.

Present:

HON. J. EDWARD LUMBARD,

Chief Judge,

HON. LEONARD P. MOORE,
HON. J. JOSEPH SMITH,

Circuit Judges.

MAROCEANO COMPANIA NAVIERA, S.A.,
as Owner of the S.T. PENTELIKON,

Plaintiff-Appellant,

—v.—

S.S. VERDI, her engines, boilers, etc., and
ITALIA SOCIETA DI NAVIGAZIONE,

Defendants-Appellants.

ITALIA SOCIETA DI NAVIGAZIONE,
as Owner of the S.S. VERDI,

Plaintiff-Appellant,

—v.—

S.T. PENTELIKON, her engines, boilers, etc., and
MAROCEANO COMPANIA NAVIERA, S.A.,

Defendants-Appellants.

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the appeal as to pre-judgment interest from the said judgment of the said District Court be and it hereby is dismissed.

A. DANIEL FUSARO
Clerk

Order Denying Petition for Rehearing

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

35106, 35202

MAROCEANO COMPANIA NAVIERA, S.A.,
as Owner of the S.T. PENTELIKON,

Plaintiff-Appellant,

—v.—

S.S. VERDI, her engines, boilers, etc., and
ITALIA SOCIETA DI NAVIGAZIONE,

Defendants-Appellants.

ITALIA SOCIETA DI NAVIGAZIONE,
as Owner of the S.S. VERDI,

Plaintiff-Appellant,

—v.—

S.T. PENTELIKON, her engines, boilers, etc., and
MAROCEANO COMPANIA NAVIERA, S.A.,

Defendants-Appellants.

A petition for a rehearing having been filed herein by counsel for Italian Line and the VERDI,

Upon consideration thereof, it is

Ordered that said petition be and it hereby is DENIED.

J. EDWARD LUMBARD, *Ch.J.*
LEONARD P. MOORE, *USCJ*
J. JOSEPH SMITH, *USCJ*
Circuit Judges

March 16, 1971

Order Denying Petition for Rehearing Containing a Suggestion That the Action Be Reheard in Banc

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

35106, 35202

MAROCEANO COMPANIA NAVIERA, S.A.,
as Owner of the S.T. PENTELIKON,

Plaintiff-Appellant,

—v.—

S.S. VERDI, her engines, boilers, etc., and
ITALIA SOCIETA DI NAVIGAZIONE,

Defendants-Appellants.

ITALIA SOCIETA DI NAVIGAZIONE,
as Owner of the S.S. VERDI,

Plaintiff-Appellant,

—v.—

S.T. PENTELIKON, her engines, boilers, etc., and
MAROCEANO COMPANIA NAVIERA, S.A.,

Defendants-Appellants.

A petition for a rehearing containing a suggestion that the action be reheard in banc having been filed herein by

counsel for Italian Line and the VERDI and no active circuit judge having requested that a vote be taken on said suggestion,

Upon consideration thereof, it is

Ordered that said petition be and it hereby is denied.

J. EDWARD LUMBARD,
Chief Judge.

March 16, 1971

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JUN 14 1971
E. ROBERT SEAVER, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. ~~1-816~~ 70-271

MAROCEANO COMPANIA NAVIERA S.A.
as Owner of S. T. PENTELIKON,

Respondent,

—against—

S.S. VERDI, her engines, etc., and
ITALIA SOCIETA DI NAVIGAZIONE (ITALIAN LINE),

Petitioner.

ITALIA SOCIETA DI NAVIGAZIONE (ITALIAN LINE),
as Owner of S.S. VERDI,

Petitioner,

—against—

S.T. PENTELIKON, her engines, etc., and
MAROCEANO COMPANIA NAVIERA S.A.

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

EUGENE UNDERWOOD
25 Broadway
New York, New York 10004
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. .....

MAROCEANO COMPANIA NAVIERA S.A.
as Owner of S. T. PENTELIKON,

Respondent,

—against—

S.S. VERDI, her engines, etc., and
ITALIA SOCIETA DI NAVIGAZIONE (ITALIAN LINE),

Petitioner.

ITALIA SOCIETA DI NAVIGAZIONE (ITALIAN LINE),
as Owner of S.S. VERDI,

Petitioner,

—against—

S.T. PENTELIKON, her engines, etc., and
MAROCEANO COMPANIA NAVIERA S.A.

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner Italia Societa di Navigazione (Italian Line) respectfully prays that a Writ of Certiorari be issued to review the judgment and opinion of the United States Court of Appeals for the Second Circuit entered in this proceeding on February 8, 1971.

Opinion Below

The opinion of the Court of Appeals is reported at 438 F.2d 854 and a copy is annexed hereto marked Appendix A. The opinion of the District Court for the Southern District of New York is reported at 312 F. Supp. 489 (1970).

Jurisdiction

The judgment of the Court of Appeals for the Second Circuit was entered on February 8, 1971. A timely petition for rehearing en banc was denied March 16, 1971, and this petition for certiorari is filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

Questions Presented

1. Whether, in a crossing situation on the high seas at the western entrance to the Mediterranean, the holding-on vessel can, with impunity, maintain her course at full speed for approximately 2.5 minutes after her master realizes that danger of collision exists, that the giving-way vessel is coming on a collision course at undiminished speed, is ignoring the signals of the holding-on vessel, and that collision cannot be avoided by any action of the giving-way vessel alone.

2. Whether a vessel proceeding on a clear, dark night toward the entrance to the Mediterranean, where many other vessels are likely to be met, can be excused for failing to use her radar to determine the course and speed of the oncoming vessel, relying instead upon observation by seaman's eye, and misjudging the course of the other vessel by 60°.

Statutory Provisions Involved

The collision occurred in international waters, hence navigation was governed by the International Regulations for Preventing Collisions at Sea. Specifically, the following sections of United States Code Title 33 apply:

"§1081. Power-driven vessels crossing (Rule 19).

When two power-driven vessels are crossing, so as to involve risk of collision, the vessel which has the other on her own starboard side shall keep out of the way of the other."

"§1083. Vessels having right of way; duty in aiding to avert collision (Rule 21).

Where by any of sections 1061 to 1094 of this title one of two vessels is to keep out of the way, the other shall keep her course and speed. When, from any cause, the latter vessel **finds herself so close that collision cannot be avoided by the action of the giving-way vessel alone, she also shall take such action as will best aid to avert collision** (see sections 1089 and 1091 of this title)." (emphasis added)

"§1089. Special circumstances requiring departure from rules to avoid immediate danger (Rule 27).

In obeying and construing sections 1061 to 1094 of this title due regard shall be had to all dangers of navigation and collision, and to any special circumstances, including the limitations of the craft involved, which may render a departure from such sections necessary in order to avoid immediate danger."

"§1091. Usual additional precautions required generally (Rule 29).

Nothing in sections 1061 to 1094 of this title shall exonerate any vessel, or the owner, master or crew thereof, from the consequences of any neglect to carry lights or signals, or of any neglect to keep a proper lookout, or of the neglect of any precaution which may be required by the ordinary practice of seamen, or by the special circumstances of the case."

Statement of the Case

This admiralty case arises out of the collision between two large ocean-going vessels, the VERDI a passenger ship and the PENTELIKON a tanker, which occurred on the west side of the entrance to the Strait of Gibraltar at 0143 hours April 16, 1964. The night was dark but clear, with good visibility. Respondent's PENTELIKON was on an easterly course making full speed of 16-17 knots while petitioner's VERDI was on a southwesterly course proceeding diagonally across the Strait also making about 17 knots.

The PENTELIKON sighted the VERDI bearing approximately 38° on her port bow at 0135,* or eight minutes before collision. PENTELIKON's Master estimated that the VERDI was on a southerly heading (190°) whereas, in fact, as shown by VERDI's automatic course recording device, she was heading southwesterly (about 250°). The error amounted to approximately 60°, a critical miscalculation as

* This is the finding of the Trial Court and was not disturbed by the Court of Appeals. However, the uncontradicted testimony of the Master of the PENTELIKON is that he first sighted the VERDI about 0132 distant approximately 6 miles.

proven by subsequent events. As the burdened vessel in a crossing situation, VERDI was required under International Rules to keep out of the way of the PENTELIKON (33 U.S.C. §1081).

Continuing to observe the VERDI, PENTELIKON's Master saw that the bearing remained constant, a sure sign of danger. Accordingly, at 0137 he flashed by blinker light the letter "U", an International Code Signal meaning "You are standing into danger." There was no response from the VERDI, which appeared to be proceeding as before. At 0140, or three minutes before collision, the Master of the PENTELIKON became alarmed. The vessels were then only approximately a mile apart and there was no indication that the VERDI had any intention of complying with her duty to keep clear or, indeed, that she was even aware of PENTELIKON's presence. Accordingly, he again flashed "U" and also sounded five short blasts on the whistle, the international danger signal. Still there was no response from VERDI. At this time, as the District Court found and the Court of Appeals agreed, the vessels were *in extremis, viz.* they had reached the point where under International Rule 21 (33 U.S.C. §1083) the holding-on vessel was required to act. The District Court found as a fact that PENTELIKON waited "several minutes" beyond this point before taking any avoiding action and held PENTELIKON at fault on this account.*

The Court of Appeals reversed and exonerated the PENTELIKON despite her delay of "several minutes". The Court said:

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*The VERDI conceded fault prior to trial and the only issue before the Court was whether PENTELIKON was also at fault, requiring an equal division of all damages.

> "The Trial Court held that when the in extremis point was reached, the PENTELIKON was obliged to 'take some affirmative action toward avoidance of the collision.' But if this were her duty, she satisfied it by veering off to starboard and reversing her engines, . . ."

But she did not take this action until seconds before collision, 2½ minutes after her master realized that VERDI alone could not avoid collision.

The District Court also held the PENTELIKON at fault for failing to use her radar which was available and in good order. That Court pointed out that radar could have given those in charge of the PENTELIKON the exact course, speed and distance of the VERDI, and that prudence and good seamanship dictated its use. The Court of Appeals reversed on this ground also, stating that the master of the PENTELIKON was entitled to rely on his visual estimates even though they were grossly wrong and plainly contributed to the collision.

REASONS FOR GRANTING THE WRIT

1. The decision below conflicts with the decisions of this Court, of other Circuit Courts and of British Courts.

The holding of the Court of Appeals that the privileged vessel in a crossing situation may continue on without changing course or speed for several minutes beyond the *in extremis* point and almost to the very moment of impact is clearly in conflict with the holdings of this Court. In *Postal S. S. Corp.* v. *El Isleo*, 308 U.S. 378, 387 (1940), this Court said:

> "The so-called privileged vessel has no absolute right to keep her course and speed regardless of the danger involved in that action. Her right to maintain her privilege ends when there is danger of collision . . ."

In *The Delaware*, 161 U. S. 459, 468 (1896), this Court said:

> "The duty of a steamer having the right of way, when approaching another steamer charged with the obligation of avoiding her, has been the subject of much discussion both in the English and American courts. That her primary duty is to keep her course is beyond all controversy. It is expressly required by the 19th Rule of the original International Code, (Rev. Stat. Section 4233), and of the 16th Rule of the Revised Code of 1885, and doubtless applies *so long as there is nothing to indicate that the approaching steamer will not discharge her own obligation to keep out of the way.* The divergence between the authorities begins at the point where the master of the preferred

steamer suspects that the obligated steamer is about to fail in her duty to avoid her. The weight of English, and, perhaps, of American authorities, is to the effect that, if the master of the preferred steamer has any reason to believe that the other will not take measures to keep out of her way, he may treat this as a 'special circumstance,' under Rule 24, 'rendering a departure' from the rules 'necessary to avoid immediate danger.' Some even go so far as to hold it the duty of the preferred vessel to stop and reverse, when a continuance upon her course involves an apparent danger of collision . . ." (emphasis added)

In *The New York*, 175 U. S. 187, 205 (1899), this Court said:

> "Her only excuse for her omission is that she was the preferred vessel within the nineteenth American and sixteenth Canadian rule, and that by the twenty-third American and twenty-second Canadian rule, it was her duty to keep her course. But the fact, that a steamer is entitled to hold her course does not excuse her from inattention to signals, from answering where an answer is required, *or from adopting such precautions as may be necessary to prevent a collision, in case there be a distinct indication that the obligated steamer is about to fail in her duty.*" (emphasis added)

The Court of Appeals' ruling is also in conflict with the decisions of other Circuits. In *The West Hartland*, 2 F. 2d 834 (9 Cir. 1924), the Trial Court held the privileged vessel at fault for failing to take timely avoiding action in the face of obvious danger. The Ninth Circuit affirmed, saying (p. 836):

"For some considerable time before the collision, the master of the West Hartland was in doubt as to the course the Governor intended to pursue, and under such circumstances it was his plain duty to solve that doubt in favor of safety by giving a danger signal or taking timely steps to avoid a collision before plunging his vessel into a position where a collision would be the natural, if not the necessary, consequence."

In *City of Chester*, 78 Fed. 186 (4 Cir. 1897), the Trial Court found the burdened vessel solely at fault. Upon appeal, the Fourth Circuit reversed, holding the privileged vessel at fault as well, saying (pp. 188-9):

"But the Pinner's Point [the privileged vessel] was not free from fault. The paramount duty of every vessel in proximity to another vessel is to avoid the risk of collision, and to take every precaution to this end; and in harbors this duty is intensified, the utmost care and vigilance being imperatively required from all vessels. The rules of navigation are prescribed for the purpose of governing the action of approaching vessels in all ordinary cases. But notwithstanding the minute provisions of these rules, in construing and obeying them, due regard must be had to all dangers of navigation, and to any special circumstances existing in any particular case, which may render a departure from them necessary in order to avoid immediate danger. Rule 24; The America, 92 U.S. 432. In the present case the Pinner's Point, under rule 19 (now 16), had the right of way, and under normal circumstances should have proceeded on her course. But this did not free her from obligation to take every care, and so to conduct herself as to

avoid a course involving risk of collision. Even the fault of the other vessel could not free her from this."

The Court of Appeals' ruling is also in conflict with the English cases construing the International Rules. In *The Otranto* [1931] App. Cas. 194, the House of Lords held the privileged vessel at fault for waiting too long before stopping and reversing her engines. Lord Buckmaster in delivering the opinion of the Court quoted with approval other British authorities as follows (pp. 201-2):

> "This is in close accordance with the view expressed by Lord Herschell in The Tasmania (1), where he says: 'as soon then as it was, or ought to a master of reasonable skill and prudence to have been, obvious that to keep his course would involve immediate danger, it was no longer the duty of the master of the Tasmania to adhere to the 22nd [now the 21st] Rule. He was not only justified in departing from it, but bound to do so, and to exercise his best judgment to avoid the danger which threatened,' and again with Vaughan Williams L.J. in the Hawke (2), where he says: 'I am inclined to think that in a case where good seamanship would assume the collision cannot be avoided by the action of the giving-way vessel alone, the case falls within the exception'—namely, the exception to the rule to keep course and speed—'even though in fact the giving-way vessel could by her own action have averted collision.'"

See also *The Etna,* 11 Asp. 30 [1907].

Finally, the Court of Appeals' decision is at odds with other decisions of the Second Circuit. In *The George S.*

Shultz, 84 Fed. 508, 512 (1898), the Court affirmed the Trial Court's decision of both to blame as follows:

> "[T]he finding of fault is clearly sustained by the proof. The period of uncertainty as to what the burdened vessel meant to do which is referred to in The Britannia, 153 U.S. 130, 14 Sup. Ct. 795, The Northfield, 154 U.S. 629, 14 Sup. Ct. 1184, and The Delaware, 161 U.S. 469, 16 Sup. Ct. 516, had passed. It was plainly manifest to the pilot of the Little Silver [the privileged vessel] that the Shultz had gone so far on her improper course that it was absolutely impossible for her, either by changing course or stopping or reversing, to keep her tow out of the way of the Little Silver . . ."

See also *The Mauch Chunk,* 154 Fed. 182 (2 Cir. 1907); *The Comus,* 19 F.2d 774, 777 (2 Cir. 1927).

It is ironic that it was also the Second Circuit which said in *Yang-Tsze Ins. Ass'n* v. *Furness, Withy & Co.,* 215 Fed. 859, 864-5 (1914):

> "The two vessels involved were steamers, and therefore could be maneuvered more easily than any other kind of vessels. They were in plain sight of each other when miles apart. They nevertheless came into collision and with such force that one of them sank in a few hours, carrying down with her the entire cargo. It is difficult to see how it all happened unless both vessels were in fault and failed to exercise reasonable care. Plain common sense constrains one to such a conclusion. To exonerate either of them under such conditions can be justified only if upon the closest scrutiny of the navigation of each vessel it can be discovered that one of them was free from all culpable blame. We have

examined the evidence in the case with care, and we have not been satisfied that either one of these vessels was free from fault. The vessels that navigate the high seas, and indeed vessels that navigate inland waters, intrusted with human lives and property of great value, must be held to the strictest standards of conduct, and when they fail to observe the requirements which the maritime law of the nations has prescribed, are to understand that they must abide the consequences."

2. The decision below raises an important question of maritime law which has not been, but should be, settled by this Court.

The Court of Appeals has decided for the first time that in clear weather, at night, a ship proceeding at sea need not use her radar but may, indeed *must,* rely solely on visual estimates. The exact words of the Court are:

"Radar is a useful electronic device for detecting the presence, and plotting the course, of other vessels, particularly in a fog or in weather reducing visibility but on a clear night with high visibility it would not have been superior to, or even effective as, the human eye. The master of the Pentelikon had the Verdi under observation and in plain sight for some time. Radar could not have given him the position of the Verdi more accurately (if as accurately) as he from his position on the bridge could determine it. In fact had he left the bridge to observe through a radar what he had been observing over the last many minutes before the collision, he might well have been charged with negligence."

No authority is cited for this startling pronouncement, which is not only egregiously wrong but also is clearly a backward step in promoting safety of life at sea. First, the Court's statement as to the value of visual estimates is at odds with human experience, for such estimates have long been known to be notoriously unreliable, especially at night, *The Georgic*, 180 Fed. 863, 867 (S.D.N.Y. 1910); *The Sarmartian*, 2 Fed. 911, 914 (Cir. Ct. of Md., 1880). Second, it was not necessary, as the Court says, for the master to leave the bridge of his ship. On the PENTELIKON, as on all vessels, the radar was located in the wheelhouse on the bridge, ready at hand for immediate use. Indeed, there was no need for the master himself to look at the radar at all. He could have assigned this duty to the mate who was on watch, which is normal procedure.

In *Afran Transport Co.* v. *The Bergechief*, 274 F.2d 469, 473-4 (2 Cir. 1960), the Court correctly described radar as "an electronic method of detecting objects and ascertaining their range and bearing." Thus, the great contribution of radar is that the navigator can quickly obtain the *exact* distance of another vessel and by observing these distances over a brief period of time can ascertain her course and the rate at which the two vessels are closing. Here the master of the PENTELIKON misjudged the VERDI's course by 60°. He thought the VERDI was moving straight across PENTELIKON's path, from left to right, whereas in fact, she was coming *toward* the PENTELIKON at a rapid rate. Radar would quickly have given him this information. Yet, the decision of the Second Circuit is practically a mandate to ignore radar in clear weather.

Marine casualties are occurring with greater frequency, resulting in loss of life, oil pollution and property damage.

These conditions should compel a strict adherence to navigation rules in conjunction with the use of all navigation aids available to the ship master. Until this decision there had been a strong judicial trend toward the required use of radar at night, even in clear weather, *The Glenville,* 210 F. Supp. 865 (S.D. Tex. 1962); *The Willowpool,* 214 F. Supp. 449 (E.D. Tex. 1963); *The Marine Leopard,* 152 F. Supp. 197, aff'd 279 F.2d 662 (9 Cir. 1960), and we submit that such decisions are an appropriate response by the Courts to a very serious safety problem. The Second Circuit has now reversed that trend by instructing those who are charged with the navigation of vessels on the high seas that they are not required to use radar at night in clear weather and might even be found guilty of negligence if they do.

We urge this Court to right this wrong. It has been over 30 years since the Court has reviewed a maritime collision case, *Postal S.S. Corp.* v. *El Isleo,* 308 U.S. 378 (1940). Since that time great changes have occurred in the maritime industry, including the development and installation of radar on practically all ocean-going vessels. Guidance from this Court on this far-reaching question is needed now. The Courts of Appeal should not be permitted to assume that their aberrations will pass unnoticed and uncorrected.

In addition, this Court should reaffirm its earlier decisions strictly applying the International Rules. The size and speed of today's vessels demand careful adherence to these rules and a statement from this Court to that effect will go a long way toward promoting safety of life and property at sea.

CONCLUSION

For these reasons the writ of certiorari should be issued to review the judgment and opinion of the Second Circuit.

Respectfully submitted,

EUGENE UNDERWOOD
25 Broadway
New York, New York 10004

June 3, 1971.

APPENDIX A

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Nos. 396-97—September Term, 1970.

(Argued January 7, 1971 Decided February 8, 1971.)

Docket Nos. 35106, 35202

MAROCEANO COMPANIA NAVIERA S.A.
as Owner of S. T. PENTELIKON,

Plaintiff-Appellant,

—against—

S.S. VERDI, her engines, etc., ITALIA SOCIETA DI NAVIGAZIONE (ITALIAN LINE),

Defendant-Appellee.

S.S. VERDI, her engines, etc., ITALIA SOCIETA DI NAVIGAZIONE (ITALIAN LINE),

Plaintiff-Appellant,

—against—

MAROCEANO COMPANIA NAVIERA S.A.
as Owner of S. T. PENTELIKON,

Defendant-Appellee.

Before:

LUMBARD, *Chief Judge;*
MOORE and SMITH, *Circuit Judges.*

Appeal by Maroceano Compania Naviera S.A. as Owner of the S. T. Pentelikon from an interlocutory decree, John M. Cannella, *Judge*, holding the Pentelikon and the S.S. Verdi owned by Italia Societa di Navigazione equally at fault, and dividing equally the damages sustained as the result of a collision. The Verdi appealed from a failure to award pre-judgment interest against the Pentelikon.

The decree of holding the vessels equally liable is reversed, and a decree holding the Verdi solely liable should be entered with costs to appellant Pentelikon; appeal as to pre-judgment interest dismissed as moot. Remanded for further proceedings.

NICHOLAS J. HEALY, New York, N. Y. (Healy & Baillie, New York, N. Y., Allan A. Baillie and John C. Koster, New York, N. Y., of counsel), *for Maroceano Compania Naviera S.A. as Owner of S. T. Pentelikon.*

EUGENE UNDERWOOD, New York, N. Y. (Burlingham Underwood Wright White & Lord, New York, N. Y., Kenneth H. Volk and Frank L. Wiswall, Jr., New York, N. Y., of counsel), *for Italian Line and the S.S. Verdi, her engines, etc.*

MOORE, *Circuit Judge*:

These consolidated actions arise out of a collision in the early morning of April 16, 1964 between the "Pentelikon," a single screw steam turbine driven oil tanker owned by Maroceano Compania Naviera S.A., and the "Verdi," a twin screw passenger and freight vessel owned by Italia Societa di Navigazione. The parties will be designated by

the names of the vessels owned by them, respectively. The trial court found both vessels equally at fault and held that damages and costs be divided equally. The Verdi was awarded interest at 6% from May 8, 1970. From this judgment the Pentelikon appeals, claiming that the Verdi was solely at fault. The Verdi seeks to modify the judgment by claiming pre-judgment interest. The pre-trial order narrowed the issues in that the Verdi admitted fault but asserted that the Pentelikon was also at fault.

On the night (April 15-16, 1964) the Pentelikon was proceeding in an easterly direction (course 090) through the Strait of Gibraltar towards the Mediterranean Sea, her speed over the ground was approximately 13 knots. The Verdi was headed for the Atlantic Ocean in a southwesterly direction (course 242) at a speed through the water of some 17 knots. The weather was clear and the visibility good. The Pentelikon sighted the Verdi at 0135 hours. As the Trial Court found, "The courses of the two vessels were such that there was a crossing situation with the Pentelikon the privileged vessel." The Pentelikon "after having sighted the Verdi, maintained her course of 090 up until the time she was *in extremis* as was required of her by the International Rules of the Road, Rule 21.", namely, where "one of two vessels [here the burdened vessel Verdi] is to keep out of the way, the other [Pentelikon] shall keep her course and speed." Thus the Pentelikon properly conformed to the navigational rule she was required to follow.

While the Pentelikon was thus proceeding, the master of the Verdi "became concerned with the Pentelikon and the risk of collision." "Since the Verdi was the burdened vessel under the Crossing Rule (Rule 19), she should have taken early action to avoid the Pentelikon, slackened her

speed, stopped, or reversed, or taken other action to avoid the collision or crossing ahead of the Pentelikon. She did none of these things."[1]

As the vessels approached each other, the Pentelikon flashed a "U" signal, meaning, "You are standing into danger."[2] No action having been taken by the Verdi, a second "U" signal was flashed and the danger warning was sounded on the Pentelikon's whistle. The vessels were then *in extremis* and the Pentelikon took affirmative action to avoid a collision by turning to starboard and by ringing down full speed astern.

Even then "this collision might have been avoided had the Verdi taken the action required of her,". However, she did not. Instead she compounded her faulty navigation. As the Trial Court found, "The Verdi was also at fault for turning to port in her last maneuver and thus tending to cross ahead of the Pentelikon instead of turning to starboard, which would have tended to have her pass astern of the Pentelikon."

In the face of such overwhelming proof that the Verdi's actions were the cause of the collision, upon what grounds did the Trial Court rest its conclusion of equal liability? The Trial Court held that when the *in extremis* point was reached, the Pentelikon was obliged "to take some affirmative action toward avoidance of the collision." But if this were her duty, she satisfied it by veering off to starboard and reversing her engines, whereas the Verdi, which could have avoided a collision, took affirmative action by turning in the wrong direction, thus colliding with the Pentelikon. The Trial Court found that the Pentelikon should have taken action after she had blown the danger signal

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1 Quotations from Trial Court's findings in opinion.

2 International Code of Signals, H.O. 103.

but she had every right to expect that the Verdi would heed the danger signal and maneuver properly. Nothing that the Pentelikon could have done could have avoided the collision in the light of the Verdi's unexpected turn to port. The Trial Court speaks of the Pentelikon's failure "to justify her conduct of inaction" but, first, there was no inaction and, second, the burden of justification was not on the privileged vessel.

The Trial Court also found the Pentelikon at fault for not using its radar. Radar is a useful electronic device for detecting the presence, and plotting the course, of other vessels, particularly in a fog or in weather reducing visibility but on a clear night with high visibility it would not have been superior to, or even effective as, the human eye. The master of the Pentelikon had the Verdi under observation and in plain sight for some time. Radar could not have given him the position of the Verdi more accurately (if as accurately) as he from his position on the bridge could determine it. In fact had he left the bridge to observe through a radar what he had been observing over the last many minutes before the collision, he might well have been charged with negligence. There was no causal connection whatsoever between the failure to observe the Verdi through a radar screen rather than by visual sighting and the collision. See *White Stack Towing Corp.*, 279 F.2d 419 (4th Cir. 1960).

The Trial Court in proper recognition of the role which hindsight plays in these collision cases said that it was unfortunate that "the masters of these two vessels did not have their able counsels' assistance available to them on the night of April 16, 1964." Equally unfortunate was the lack of a library of this Circuit's decisions available on the bridge because counsel for the Verdi could have

read to the master from this Court's decisions in *Hellenic Lines* v. *The Exmouth*, 253 F.2d 473 (2d Cir. 1958), *cert. denied*, 356 U.S. 967 (1958) and *Northern Petroleum Tank S.S. Co.* v. *City of New York*, 282 F.2d 120 (2d Cir. 1960). By coincidence, the factual situations in both cases were almost identical to the present case. In both cases the trial court held each vessel to have been at fault and in each case this court reversed the finding of equal liability.

In *Northern Petroleum* this court said as to the "Tynefield" [corresponding to the "Pentelikon" here]:

> "• • • The entire purpose of any navigational rule is to create as much certainty as possible so that each vessel can conduct itself accordingly. The Tynefield had a right (even a duty as well) to maintain its course until collision appeared likely. The Dongan Hills was under an obligation to avoid a collision by obeying the rule and the Tynefield had a right to expect that she would do so. • • •
>
> "In view of this long recognized navigational rule and the importance of strict adherence thereto, the trial court's conclusions that 'Regardless of the right and privilege of the Tynefield to maintain her course and speed there was a continuing duty on her part to exercise care to avoid collision until the crossing was safely effected'; that the Tynefield 'failed to change her course and speed until too late'; and 'took no precaution to avoid the impending collision until it was too late, relying recklessly on its privilege in this crossing situation' are not in accord with the law. It was not reckless for the Tynefield to rely on its privilege. To the contrary she was obliged under the Rule to maintain her course (The Delaware, 1896, 161 U.S. 459, 16 S. Ct. 516, 40 L. Ed. 881). She cannot be charged with any

failure to change her speed and course when to have done so would have violated the Rule. Nor did she have any reason to believe that the Dongan Hills would not comply with the Rule. It was the Dongan Hills' duty to change her course and speed (if necessary) to avoid collision, * * * ."

In the *Hellenic Lines* case, the Hellenic (Pentelikon) and the Exmouth (Verdi) sighted each other at some distance on a clear night. The Hellenic was the privileged vessel and held her course to almost the last minute as here. She gave proper whistle signals and finally the danger alarm, then turned hard right and reversed—all as did the Pentelikon. There, too, was involved a reversal of the trial court's finding of equal liability and a holding by this court of sole liability on the part of the Exmouth.

The Trial Court's conclusion of the Pentelikon's fault *in extremis* is also inconsistent with this Court's decision in *The Stifinder,* 275 F. 271 (2d Cir. 1921), where the Court said:

"The Stifinder's duty was to keep her course and speed in the expectation that the Selje would obey the law and keep out of the way. When it became apparent that the steamer did not intend to conform to the law, the vessels were then in extremis, and what was done or omitted to be done by The Stifinder in the agony of collision can make no difference, as it is impossible to consider a decision so made as a fault. * * * "

If, as the Trial Court here indicated, the Verdi's action in turning to port instead of to starboard (the actual cause of the collision) "may be excusable in view of the fact that the vessels at that time were *in extremis,* so much the more were the Pentelikon's actions when this point was reached.

Upon the law and the facts, the court concludes that the Verdi was solely at fault. The decree appealed from is reversed with costs with the question of damages and the proceedings for the ascertainment thereof to be decided by the Trial Court. The appeal as to pre-judgment interest is dismissed.

Supreme Court U.S.
FILED
JUL 7 1971
E. ROBERT SEAVER, CLERK

70-271

IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 1816

MAROCEANO COMPANIA NAVIERA S.A., as Owner of S.T. PENTELIKON,

Respondent,

against

S.S. VERDI, her engines, etc., and ITALIA SOCIETA DI NAVIGAZIONE (ITALIAN LINE),

Petitioner.

ITALIA SOCIETA DI NAVIGAZIONE (ITALIAN LINE), as Owner of S.S. VERDI,

Petitioner,

against

S.T. PENTELIKON, her engines, etc., and MAROCEANO COMPANIA NAVIERA S.A.,

Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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IN THE

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No. 1816

MAROCEANO COMPANIA NAVIERA S.A., as Owner of S.T. PENTELIKON,

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Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Statement of the Case

Neither Petitioner's "Statement of the Case" nor its outline of the "Questions Presented" is in accordance with the facts as found by the Trial Judge, and consequently

neither conveys an accurate representation of the unanimous decision of the United States Court of Appeals for the Second Circuit.

The Petition presents the not unusual case of a "burdened" (giving-way) vessel in a crossing situation, having confessed fault for violating her statutory duty to stand clear of the "privileged" (holding on) vessel, laboring to impose equal blame on the privileged vessel which adhered to the International Regulations for Preventing Collisions at Sea, 33 U.S.C. §§ 143-47*, by holding course and speed until it became apparent that a collision could not be avoided by action of the burdened vessel alone.

The burdened Verdi sighted the privileged Pentelikon off her starboard bow while the latter was steaming eastward near the Straits of Gibraltar on a clear night. Thereafter the Verdi, outbound from the Mediterranean and heading in a general southwesterly direction, maneuvered to avoid a third vessel and in the process lost track of the Pentelikon until she and the Verdi were approximately a half mile apart. Thereupon the Verdi, contrary to the express mandate of Rules 22 and 23, 33 U.S.C. §§ 146 (f) and (g), turned to port in an attempt to cross the bow of the Pentelikon, instead of making a turn to starboard, which would have taken her clear of that vessel.

Meanwhile, the Pentelikon had observed the Verdi off her port bow and had maintained her course and speed, as she was not only permitted but required to do under the Regulations, while her Master attempted to alert the Verdi to her duty by flashing the letter "U" (two short flashes and one long one) by "blinker" light, meaning, under the

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* The reference is to the Regulations in force at the time of the collision. The Regulations cited by Petitioner (Petition, pp. 3-4), 33 U.S.C. §§ 1051-94, did not take effect until September 1, 1965, some 18 months after the collision. However, the four Regulations cited by Petitioner were not changed in the new Regulations.

International Signal Code, "You are standing into danger". The Pentelikon's Master received no response to either the first or a second such signal, given approximately three minutes before the collision. When the vessels were still a distance apart estimated at a mile and a half on the basis of the relative speed at which they were approaching each other, he sounded a danger signal on the ship's whistle.

Petitioner argues that at the time the danger signal was sounded the Pentelikon's Master realized that the Verdi could not avoid collision alone. This argument would seem to assume that in fact the Verdi was unable at that moment to avoid collision singlehandedly. Respondent vigorously disputes the validity of any such assumption, which has no support in the findings below. The state of mind of the Pentelikon's Master at that moment is therefore wholly immaterial, but in any event the best evidence of his subjective attitude, even if it were relevant, is the objective meaning of the signal he used. The danger signal indicates *doubt* as to whether another vessel is taking sufficient action to avoid collision. Rule 28 of the International Regulations, 33 U.S.C. § 147. When no reply was received to that signal the Pentelikon turned hard to starboard and reversed her engines. Her navigation in this regard was precisely in accordance with the Regulations. Rule 21, 33 U.S.C. § 146(e).

There was *no* finding by the Trial Court that the Pentelikon's Master did not take avoiding action until "2½ minutes after" he "realized that Verdi alone could not avoid collision". This statement of Petitioner undoubtedly has its origin in its persistent misreading of the testimony of the Pentelikon's Master. To accept the Verdi's version of the facts would require the assumption that the Pentelikon's Master, after having conscientiously endeavored to alert the Verdi to her duty of keeping out of the way on three separate occasions—twice by flashing

light and once by a whistle signal—thereafter permitted the collision to occur by doing nothing. Such an assumption would not only be contrary to the facts as found by the District Court, but would be beyond belief when applied to the Master of a potentially explosive supertanker. As the Court of Appeals stated, in holding the Verdi solely at fault:

> "The Trial Court held that when the *in extremis* point was reached, the Pentelikon was obliged 'to take some affirmative action toward avoidance of the collision'. But if this were her duty, she satisfied it by veering off to starboard and reversing her engines, whereas the Verdi, which could have avoided a collision, took affirmative action by turning in the wrong direction, thus colliding with the Pentelikon. The Trial Court found that the Pentelikon should have taken action after she had blown the danger signal but she had every right to expect that the Verdi would heed the danger signal and maneuver properly. Nothing that the Pentelikon could have done could have avoided the collision in the light of the Verdi's unexpected turn to port. The Trial Court speaks of the Pentelikon's failure 'to justify her conduct of inaction' but, first, there was no inaction, and second, the burden of justification was not on the privileged vessel."

Statutory Provisions Involved*

RULE 19

"When two power-driven vessels are crossing, so as to involve risk of collision, the vessels which has

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* The Rules quoted are those applicable at the time of the collision. The new Rules became effective on September 1, 1965. See 33 U.S.C. §§ 1051-94. The only quoted Rule affected by the new Rules is Rule 22, wherein, following the word "shall", the words "so far as possible, take positive early action to comply with this obligation, and shall" were added in the 1965 Rules.

the other on her own starboard side shall keep out of the way of the other". (33 U.S.C. § 146[c])

RULE 21

"Where by any of these Rules one of two vessels is to keep out of the way, the other shall keep her course and speed. When, from any cause, the latter vessel finds herself so close that collision cannot be avoided by the action of the giving-way vessel alone, she also shall take such action as will best aid to avert collision (see Rules 27 and 29)." (33 U.S.C. § 146[e])

RULE 22

"Every vessel which is directed by these Rules to keep out of the way of another vessel shall, if the circumstances of the case admit, avoid crossing ahead of the other." (33 U.S.C. § 146[f]).

RULE 23

"Every power-driven vessel which is directed by these Rules to keep out of the way of another vessel shall, on approaching her, if necessary, slacken her speed or stop or reverse." (33 U.S.C. § 146[g])

RULE 27

"In obeying and construing these Rules due regard shall be had to all dangers of navigation and collision, and to any special circumstances, including the limitations of the craft involved, which may render a departure from the above Rules necessary in order to avoid immediate danger." (33 U.S.C. § 146[k])

RULE 28

(a) "When vessels are in sight of one another, a power-driven vessel under way, in taking any course authorised or required by these Rules, shall indicate that course by the following signals on her whistle, namely:

One short blast to mean 'I am altering my course to starboard.'

Two short blasts to mean 'I am altering my course to port.'

Three short blasts to mean 'My engines are going astern.'

(b) "Whenever a power-driven vessel which, under these Rules, is to keep her course and speed, is in sight of another vessel and is in doubt whether sufficient action is being taken by the other vessel to avert collision, she may indicate such doubt by giving at least five short and rapid blasts on the whistle. The giving of such a signal shall not relieve a vessel of her obligations under Rules 27 and 29 or any other Rule, or of her duty to indicate any action taken under these Rules by giving the appropriate sound signals laid down in this Rule." (33 U.S.C. § 147)

RULE 29

"Nothing in these Rules shall exonerate any vessel, or the owner, master or crew thereof, from the consequences of any neglect to carry lights or signals, or of any neglect to keep a proper lookout, or of the neglect of any precaution which may be required by the ordinary practice of seamen, or by the special circumstances of the case." (33 U.S.C. § 147[a])

POINT I

The navigation of respondent's vessel, the Pentelikon, was conducted precisely in accordance with Rule 21 of the International Regulations for Preventing Collisions at Sea and the decision below is not in conflict with any decisions of this or any other court construing those regulations.

The leading American authority on the crossing situation under the International Regulations is *Wilson* v. *Pacific Mail S.S. Co.* (*The Newport-The Svea*), 276 U.S. 454 (1928), a case remarkably similar to the case at bar. The Svea, like the Pentelikon, was the privileged vessel, and the Newport, like the Verdi, was burdened. In

reversing a decision of the Circuit Court of Appeals for the Ninth Circuit holding both vessels at fault, this Court stated, at pages 461-62:

> "The Newport kept her course and speed up to the moment of collision and it is admitted that in so doing she was at fault. But her counsel claim that The Svea also was at fault in holding her course and speed and that by acting differently she should have avoided the accident. The evidence does not support that view. Consideration must be given to the circumstances as they appear at the time; not as they are now known. *The Svea adhered to the fundamental rule. If in the difficult circumstances forced upon him her navigator, whose qualifications are not questioned, exercised his best judgment in not departing therefrom, the burdened vessel must accept the consequences.* Having driven him into a perplexing situation, the Newport cannot complain because he failed to make the most judicious choice between the hazards presented." (Emphasis added).

As appears from the Circuit Court of Appeals decision, 15 F.2d 342, 343 (9th Cir. 1926), the Svea held her course until she was within a quarter mile of the Newport and within moments of collision. Here, the Verdi's gross and admitted inattention to her duty placed the Pentelikon's Master in a position of peril very similar to that confronting the Svea's Master. Having done so, it ill behooves the Verdi to suggest now that the Pentelikon's Master's decisions in the crucial moments before collision were a contributing factor.

In an effort to justify a grant of certiorari, Petitioner labors to create a semblance of a conflict between decisions in this Court, in the Ninth Circuit, in the Fourth Circuit, and in the Second Circuit, relying upon cases involving

various navigational situations arising under the Inland Rules.*

Petitioner's quotation (Petition, pp. 7-8) from *The Delaware,* 161 U.S. 459 (1896) is from a paragraph which is followed by this language (p. 469):

> "The cases of the *The Britannia* v. *Cleugh* ('*The Britannia*'), 153 U.S. 130 and *Hutchinson* v. *The Northfield,* 154 U.S. 629, Appx. must be regarded, however, as settling the law that the preferred steamer will not be held in fault for maintaining her course and speed, so long as it is possible for the other to avoid her by porting,** at least in the absence of some distinct indication that she is about to fail in her duty. If the master of the preferred steamer were at liberty to speculate upon the possibility, or even on the probability, of the approaching steamer failing to do her duty and keep out of his way, the certainty that the former will hold his course, upon which the latter has a right to rely, and which it is the very object of the rule to insure, would give place to doubts on the part of the master of the obligated steamer as to whether he would do so or not, and produce a timidity and feebleness of action on the part of both, which would bring about more collisions than it would prevent. *Belden*

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* Under Rule 28 of the International Regulations, 33 U.S.C. § 147, now 33 U.S.C. § 1090, sound signals of one or two short blasts indicate the rudder action being taken. Hence, they are appropriately called "rudder" or "turning" signals. Under Article 18 of the Inland Rules, 33 U.S.C. § 203, on the other hand, such signals are proposals, or signals of intention; vessels navigating in inland waters must, by an appropriate exchange of signals, reach agreement as to the manner in which their passage is to be effected. While cases under either set of Rules may be cited interchangeably on many issues, it is manifest that under the Inland Rules a failure to respond to a signal, or the sounding of a "cross" signal, may alert the navigator of a privileged vessel that something is amiss at an earlier point in time than would a signal sounded under the International Regulations.

** *I.e.,* turning to starboard. When *The Delaware* was decided, steering gear was so constructed that the wheel had to be turned to port in order to turn the rudder and the ship's head to starboard.

v. *Chase,* 150 U.S. 674; *The Highgate,* 62 L. T. 841, 6 Asp. Mar. L. Cas. 512.

* * *

"In the case under consideration there was really nothing to apprise the tug that the Delaware would not port * and go under her stern until the collision became inevitable. . . . Until the last moment the tug had a right to assume that she would comply with the rule. . . ."

The Delaware was decided under the Inland Rules, as were *Postal S.S. Corp.* v. *El Isleo,* 308 U.S. 378 (1940); *The New York,* 175 U.S. 187 (1889); *The City of Chester,* 78 Fed. 186 (4th Cir. 1897); *The George S. Shultz,* 84 Fed. 508 (2nd Cir. 1898); *The Mauch Chunk,* 154 Fed. 182 (2nd Cir. 1907) and *The West Hartland,* 2 F.2d 834 (9th Cir. 1924), cited at pages 7-11 of the Petition.

In *El Isleo, supra,* this Court upheld the validity of Rule VII of the Steamboat Inspectors' Rules, now Section 80.7 of the Pilot Rules for Inland Waters, 33 C.F.R. 80.7, imposing upon both vessels crossing in *inland* waters the obligation to sound a danger signal, and stop and back if necessary, when there is a misunderstanding of, or objection to, a proposal for passing made by a whistle signal.

The privileged vessel in *The New York, supra,* was faulted for failing to respond to a signal proposing a departure from the "Narrow Channel" Rule, Article 25 of the Inland Rules, 33 U.S.C. § 210. The facts did not even remotely resemble those surrounding the Pentelikon-Verdi collision. In short, there is absolutely nothing in the decision of the Court of Appeals in this case in conflict with this Court's construction of the Inland Rules in *The Delaware, El Isleo* or *The New York,* and the decision of the Second Circuit is in complete accord with this Court's decision in the leading case on the crossing situation, *Wilson* v. *Pacific Mail S.S. Co., supra.*

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* *I.e.,* turn to starboard.

Nor has Petitioner been able to demonstrate any conflict between the holding of the Court of Appeals for the Second Circuit in the present case and those of the Court of Appeals for the Fourth and Ninth Circuits. If there was ever a conflict between the Second and the Ninth Circuits, it was set at rest by this Court's reversal of the Ninth Circuit decision in the *Wilson* case, *supra*. In *The West Hartland, supra,* the privileged vessel was faulted for not sounding the danger signal required by the Inland Rules or taking timely steps to avoid collision. The Pentelikon, on the other hand, not only sounded a danger signal, although it was not obligatory under the International Regulations, but twice flashed the "U" signal. With respect to *The West Hartland,* Griffin, the leading American authority on marine collision law, states:

> "The suggestions that 'timely steps' should have been taken is unfortunately vague. It would seem that, under the authorities already discussed, the holding-on vessel was required to maintain her course and speed." Griffin, The American Law of Collision, p. 148.

Some years after deciding *The West Hartland,* the Circuit Court of Appeals for the Ninth Circuit held it inapplicable to the facts of a case where, as here, the privileged vessel's navigator gave a timely danger signal after the burdened vessel's original fault, saying that "thereafter it was the failure of the Myers [the burdened vessel] to respond which caused the situation of imminent peril". *Pacific Atlantic S.S. Co.* v. *United States,* 63 F.2d 414, 417 (9th Cir. 1933).

The collision involved in *The City of Chester,* 78 Fed. 186 (4th Cir. 1897) occurred in the crowded harbor of Norfolk. The privileged vessel was faulted for not sounding the danger signal, which is mandatory under the Inland Rules when the intentions of the other vessel are not understood. Compare *Cia. de Nav. Cebaco* v. *The Steel Fyer,*

200 F.2d 643 (4th Cir. 1952), cert. denied, 345 U.S. 925, which is completely in accord with the decision of the Court of Appeals for the Second Circuit in this case.

In *The George S. Shultz,* 84 Fed. 508 (2nd Cir. 1898) the holding-on vessel was faulted for a deficient lookout causing her to hold course until, as the Court found, it was manifestly impossible for a tug with a schooner in tow in inland waters to take sufficient avoiding action on her own. The Inland Rules also governed the situation facing two ferry boats in *The Mauch Chunk,* 154 Fed. 182 (2nd Cir. 1907) and again the holding-on ferry was faulted for a deficient lookout, which left her unaware of the negligent act of the other ferry in leaving her slip too soon. The facts of neither of these cases bear any resemblance whatsoever to those which confronted the Pentelikon in the present case.

Rule 19 of the Supreme Court Rules does not include a possible conflict between a decision of a Court of Appeals with decisions of foreign courts as a reason for the granting of certiorari. In any event, there is in fact no real divergence between the decision of the Court of Appeals for the Second Circuit in this or any other crossing case and those of the English Courts. Thus, in *The Otranto* [1931] App. Cas. 194, 201 (Petition, p. 10) the House of Lords said:

> "The ship that is bound to keep her course is not entitled to alter it at a moment when there is ample time for the ship that is bound to give way to discharge her duty, for that ship is entitled to rely upon obedience to the rule by the ship that has to keep her course. * * * The rule was designed to secure that the stand-on vessel shall maintain her course until the last safe moment. What that safe moment is must depend primarily upon the judgment of a competent sailor, forming his opinion with knowledge of the necessity of obedience to the rule and in the face of all existing facts."

This quoted language expresses precisely the same thought as was express by this Court in *Wilson* v. *Pacific Mail S.S. Co., supra,* p. 6.

Petitioner's suggestion that the decision of the Court of Appeals in this case differs from its own prior decisions is best answered by the Court's own opinion.

In *The Comus,* 19 F.2d 774 (2nd Cir. 1927), one of the cases cited by Petitioner as supposedly in conflict with the decision in this case, the holding-on vessel made a 17° change of course to starboard when the vessels were two miles apart, and was faulted for failure to indicate the change with a whistle signal.

Respondent does not understand what is supposed to be "ironic" in the quotation (Petition, p. 11) from the Second Circuit Court of Appeals opinion in *Yang-Tsze Ins. Ass'n.* v. *Furness, Withy & Co.,* 215 Fed. 859 (2nd Cir. 1914). The Court there found the negligence of the giving-way vessel "inexcusable and even unparalleled" (215 Fed., at 865) and held the holding-on vessel at fault because "At the time she ported her helm,* she was a mile away from the Alleghany, and the circumstances had not yet developed which justified any departure from the established rules" (215 Fed., at 862). The Court said, "We are obliged, therefore, to hold that the Pomaran not only violated Article 21 but that in doing so was not excused under Article 27" (215 Fed., at 863). Here, on the other hand, the Pentilikon acted strictly in accordance with the Rules, and was therefore properly held free from fault.

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* *I.e.,* turned to starboard.

POINT II

The decision below correctly applied the standards of reasonableness and causality to the use of electronic aids to navigation in holding that the non-use of radar by the Pentelikon, the privileged vessel, on a clear night was not a fault contributing to the collision.

The Pentelikon was faulted by the District Court for not using radar, even though the night was clear, no special circumstances existed, and both her Master and Watch Officer had had the Verdi under visual observation for at least eight minutes prior to the collision. The District Court did not explain how the absence of any information which might have been obtained from radar could have affected the Pentelikon's statutory duty to maintain her course and speed, or could in any way have contributed to the collision.

No statute or international convention requires vessels to carry radar equipment. However, if a vessel *is* equipped with radar, she is required under the general maritime law to use it when navigating in, or approaching an area of known poor visibility, *Afran Transport Co.* v. *The Bergechief*, 274 F.2d 469 (2nd Cir. 1960), affirming 170 F. Supp. 893 (S.D.N.Y. 1959), or when special circumstances are present, as in a case where the area is known to be studded with stationary obstructions to navigation, such as offshore oil well drilling platforms. *The Willowpool*, 214 F. Supp. 865 (E.D. Tex. 1963).

In *The Triton—The Baranof*, 1956 A.M.C. 967 (Supreme Court of Canada, 1964) (not officially reported), the Supreme Court of Canada pointed out the danger of overreliance on radar in the following language:

> "The bare truth is that, on that night, there was no need for radar. The other ship, the Triton, was not equipped with it and no one could seriously

> contend this to be of any significance in this case. As I appreciate the substance of the findings of Smith J., 'paying so much attention to radar' is indicative, as a circumstance rather than a fault, of what Landstrom did instead of what he said he should have done, i.e. paying attention 'to what his eyes could have seen ahead of his vessel.' This he failed to do and this was his fault. In my view, all these arguments centered on the subject matter of radar are, in the circumstances of this case, foreign to the determination of the matter." (p. 988).

Similarly, the Court of Appeals held in the present case that "on a clear night with high visibility it [radar] would not have been superior to, or even effective as, the human eye".

No statute or rule of law requires the use of radar in clear weather, where no special circumstances are present. But even if there were any such requirement, it would be wholly immaterial here. Petitioner's contention that the Pentelikon's Master's estimate of the course of the Verdi was off by approximately 60° is not supported by any finding of fact made by the District Court, and hence it was not "proven by subsequent events" to have been "a critical miscalculation". But if, as Petitioner contends, the Verdi was actually on a course more nearly reciprocal to that of the Pentelikon than the latter's Master thought, then only a very minor alteration to starboard on the Verdi's part would have enabled her to pass astern of the Pentelikon and thus avoid the collision. Having less of an alteration of course to make, the Verdi would need less time to make it and hence a more precise estimate of the Verdi's actual course would not have required the Pentelikon's Master to take avoiding action any earlier than it was in fact taken.

It is self-evident that if the employment of a device or precaution would not in any way have altered a vessel's obligations, an omission to employ it could not possibly be

considered a contributing cause of a collision. Thus, this Court has repeatedly held that the absence of a proper lookout was not a contributing fault where the vessel's navigators had the other vessel under observation at the material times. *The Farragut,* 77 U.S. 334 (1870); *The Dexter,* 90 U.S. 69 (1894); *The Blue Jacket,* 144 U.S. 371 (1892); *The Victory,* 168 U.S. 410 (1897). Nor will such a lack be considered a contributory fault if the vessel in fact did what she ought to have done under the Rules. *The Fannie,* 78 U.S. 238 (1871). Similarly, a vessel will not be faulted for failure to use radar under conditions requiring its use if the failure did not in fact contribute to the collision. *White Stack Towing Corp.* v. *Bethlehem Steel Co.,* 279 F.2d 419 (4th Cir. 1960).

Periodic observations of the screen of a properly functioning radar and careful plotting of the information thereby obtained will enable a navigator to calculate, with reasonable precision, the course and speed of another vessel which is on a steady course and is maintaining a steady speed. Thus, in *Afran Transport Co.* v. *The Bergechief, supra,* an expert testified that a competent radar operator could obtain a general indication of the course and speed of another vessel after a series of radar observations extending over a period of three minutes. Here, however, within a brief period prior to the collision, the Verdi was on several different courses, particularly while she was maneuvering to avoid a third vessel. Even if composite information from the Pentelikon's radar could have become available to her navigators without a time lag, it would have been misleading at best, and could only have reinforced their perfectly proper assumption that the Verdi would fulfill her statutory obligation of giving way in time to avoid the Pentelikon, just as she had maneuvered to avoid the other vessel. Instead of doing so, the Verdi turned to port across the Pentelikon's course in the final moments. It was this reckless maneuver, and not the

Pentelikon's non-use of radar, which, as the Court of Appeals said, "compounded [the Verdi's] faulty navigation" and made the collision inevitable.

CONCLUSION

The petition should be denied.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. ~~1816~~

MAROCEANO COMPANIA NAVIERA S.A.
as Owner of S. T. PENTELIKON,

Respondent,

—against—

S.S. VERDI, her engines, etc., and
ITALIA SOCIETA DI NAVIGAZIONE (ITALIAN LINE),

Petitioner.

ITALIA SOCIETA DI NAVIGAZIONE (ITALIAN LINE),
as Owner of S.S. VERDI,

Petitioner,

—against—

S.T. PENTELIKON, her engines, etc., and
MAROCEANO COMPANIA NAVIERA S.A.

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITIONER'S REPLY MEMORANDUM

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

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PETITIONER'S REPLY MEMORANDUM

Respondent's opposing brief contains a new and serious distortion of fact, and of the District Court's findings, of which this Court should be made aware.

Respondent says (p. 2) that the PENTELIKON "adhered to" the International Rules "by holding course and speed until it became apparent that a collision could not be avoided by action of the burdened vessel alone." But the District Court found that the interval was "several minutes" and the testimony of the PENTELIKON's master proves it. The District Court found (and the Court of Appeals did not disturb this finding) that:

> "When no action was taken by the Verdi, the letter 'U' was again flashed and the Danger Signal pursuant to Rule 28(b) of the International Rules of the Road was sounded on the ship's whistle. **Several minutes later,** Captain Hazapis ordered 'Hard to Starboard' and rang down emergency astern on the telegraph. . ."

Appendix to Petition, p. 4; 392 F. Supp. 489, 491 (emphasis supplied).

The PENTELIKON's master testified that the second flash of the "U" signal and the danger signal occurred at 0140, that he *then* thought that "both" vessels would have to maneuver if collision were to be avoided, *i.e.*, that the VERDI could *not* avoid collision alone, and that the collision occurred 2½ to 3 minutes thereafter. His testimony to this effect is printed *infra,* pp. 5-8.

Thus it was established, and the District Court found, that the PENTELIKON, in violation of Rule 21, held course and speed into the jaws of collision for "several minutes" after it 'became apparent' that the VERDI could not avoid collision alone.

Respondent argues for the first time (p. 3) that "The state of mind of the PENTELIKON's master at that moment [when he sounded the danger signal, at 0140] is therefore wholly immaterial." Ridiculous. Under Rule 21 the PEN-

TELIKON had the duty to "take such action as will best aid to avert collision" when she found herself "so close that collision cannot be avoided by the action of the giving-way vessel alone." This Rule requires the master of the holding-on vessel to reach a conclusion in his own mind as to when that moment has arrived. His state of mind* is, therefore, all-important; and, as he freely admitted (*infra* pp. 5-8), when he flashed the "U" signal the second time and sounded the danger signal, his conclusion was that, if a collision was to be avoided, maneuvers would have to be made by *both* vessels. Rule 21 required him to make a judgment, and, as he testified, he made it. But the same Rule also required him to **act** upon that judgment, and in this he failed utterly. Respondent now insists, for the first time (pp. 3-4), that the irrationality of his failure to act suggests that he did not realize that he should act; but the obvious explanation for his failure is a stubborn insistence upon what he supposed to be his "right of way", in the apparent expectation that the VERDI would somehow be frightened off.

But, unfortunately, the very kind of situation existed which Rule 21 was intended to overcome, *viz.*, the VERDI had lost sight of the PENTELIKON and did not hear or see her signals. This has happened before and will doubtless happen again. In the interest of safety of life at sea the law should be made clear that the holding-on vessel, under Rule 21, *must* "take such action as will best aid to avert collision" when those in charge of her navigation conclude that the giving-way vessel cannot do so by any maneuver of hers alone.

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* Which might have been much improved—certainly the facts at his disposal would have been vastly increased—if he had been using his radar.

Judge Addison Brown, a justly famed exponent of the law of collision, repeatedly asserted the basic proposition that governs here, *viz.*, that a privileged vessel has no right of way into collision; see *The Non Parielle*, 33 F. 524, 527 (S.D.N.Y. 1887); and *The Aurania and The Republic*, 29 F. 98 (S.D.N.Y. 1886), where he said:

> "Whenever danger of collision has become manifest, and the vessel previously bound to avoid it is plainly neglecting her duty to do so, the circumstances are special, and the other vessel must do what she can to prevent disaster. If this rule were not acted on and rigidly enforced, disastrous collisions would arise daily, and lives and property of innocent persons be sacrificed to a tenacious adherence to the mere right of way" (p. 126).

If holding-on vessels, including large oil tankers, are to be held privileged to continue at full speed on a collision course after they have realized the imminent danger and until within 30 seconds of actual striking, life at sea will be perilous indeed, and the risk of damage to life, property and the ecology will be greatly enlarged; the newest breed of oil tanker now building will carry 500,000 tons of petroleum product, often highly explosive or inflammable and always pollutant.

The purpose of this memorandum, as well as that of our Petition, is to convince this Court that the questions here involved are of sufficient importance to warrant—even to require—the attention of this Court; hence we have refrained from pointing out Respondent's errors in analyzing the authorities.

Respectfully submitted,

EUGENE UNDERWOOD
Counsel for Petitioner

Dated: July 12, 1971

Testimony of Nicholaos Hazapis,
Master of the PENTELIKON

"Q. Did it occur to you then that the time might come when you would have to take some action? A. (Through the interpreter) When I reach here, I put the first flash.

Q. Indicating P-2 and V-2 [on Exh. G]? A. Yes. Then, when I saw that he was not in mind to change her course—when I realize that the collision is—the Verdi doesn't turn, the collision will be coming, and we have to take steps to avoid the collision.

Q. At that time you blew five blasts and flashed the letter "U" again? A. Yes.

Q. That was the situation at that time. Did you do anything else? A. No.

Q. Just the "U" and the five blasts? A. Yes.

Q. Did you have— A. Anything else, you mean what else?

Q. Anything. A. Signal to the Verdi?

Q. Anything at all. A. We check our lights.

Q. Anything else? A. Nothing else. We check our navigation lights. Nothing else.

Q. You checked to make sure that your red side light was burning? A. Running, the masthead.

Q. And the white masthead lights were burning? A. Yes.

Q. I suppose you did that because you were getting worried about the imminence of a collision, is that right? A. Yes.

Q. Did you have any reason to believe at that time that the Verdi had even seen you? A. (Through the interpreter) Since I blow to him, I signalled to him and I flashed him, then I realized that he didn't see me.

Q. When did you realize that, Captain? A. After the second signal we made" (52a-3a).*

* * * * *

* All such references are to the Appendix filed with the briefs in the Court of Appeals.

"Q. Are you telling me, Captain, that— A. 0140 we make the second signal.

Q. The second "U"? A. "U" and the blast.

Q. The five blasts? A. Yes. Then, after doing all those things, about two minutes" (55a).

• • • • •

"Q. Let's go back to the time when you blew your whistle, the five blasts. That was at 0140, I think you told me. Will you look, please, at page 6 of your statement, the last paragraph? You may read it, if you like. A. Yes. "At the time when I blow," this paragraph?

Q. Yes, that is the one, the last one. A. Yes.

Q. Did you have in mind at that time that collision could be avoided if she went hard right and you went hard left? A. Yes.

Q. If she went hard right, your reason for going hard left would be to swing your stern away from him? A. Swing my stern, yes.

Q. Were you thinking at that time then *that you both had to maneuver to avoid collision?* A. *Both*" (64a) (emphasis supplied).

• • • • •

"Q. The next thing you did was go in the wheelhouse and put her on stop and full astern and hard astarboard? A. Yes. Also we blow the three short blasts.

Q. Was that a little less than a minute after you blew the five blasts? A. A minute, about.

Q. That would make that about 0141, is that right? A. Maybe more. Two.

Q. 0141 or 0142? A. 0142.

Q. That would be another minute or two minutes before the collision? A. One minute.

Q. One minute? A. Yes. I calculate one minute. Maybe it was less than one minute. When we saw the collision we cannot avoid, the Verdi doesn't take any attention, we have to take these steps" (46a).

• • • • •

"Q. What is the next thing that happened, Captain, after you sounded the five blasts and flashed the "U" the second time? A. I waited a little bit. After I have seen the Verdi has not made any changes, I went in the wheelhouse and I put the engines in reverse. I told the wheelsman, "All right, starboard. When the wheelsman put—I saw the indicator that it was all starboard, hard starboard.

Q. You say you waited a little bit. How long was that? What is your best estimate? A. Until the time of collision, it was. 0143. 0140, maybe two minutes later.

Q. Are you telling me, Captain, that— A. 0140 we make the second signal.

Q. The second "U"? A. "U" and blast.

Q. The five blasts? A. Yes. Then, after doing all those things, about two minutes.

Q. You mean to say that when you went into the wheelhouse— A. We make the signal. Then we go to the wheelhouse.

Q. Wait until I ask you the question, please. After you flashed the second "U" and blew the five, the next thing you did was go in the wheelhouse and put the engines full astern and give a wheel order. What was the time interval between those things? A. (Through the interpreter) To ring the telegraph, about one minute.

Q. You mean that you rang the telegraph full astern about one minute after you sounded the five blasts? A. Yes. One or two minutes we ring the telegraph.

Q. There is a big difference between one and two minutes, Captain. What is your best estimate? A. About two minutes after.

Q. The telegraph was rung full astern about two minutes after the five blasts? A. Yes.

Q. That would be one minute before the collision at 0143, is that correct? A. Yes" (55a-6a).

* * * * *

"Q. I want to see if I can understand you correctly, Captain. You went into the wheelhouse on this occasion and the first thing you did was ring the telegraph full astern? A. Yes.

Q. Then you ordered hard right to the man at the wheel? A. Yes.

Q. Then you blew three blasts? A. Yes, three blasts.

Q. Then you went out to the port wing? A. Yes.

Q. Then the collision? A. The collision.

Q. How much time was that from the time you entered until the time you got back out? Half a minute? A. Half a minute, like that. About like that, a half a minute. Half a minute, and when the collision happen, I told the second mate to ring the bell, the alarm bell, after a half-minute, too" (58a-9a).

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IN THE

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October Term, 1970

No. ~~1010~~

MAROCEANO COMPANIA NAVIERA S.A., as Owner of S.T. PENTELIKON,

Respondent,

against

S.S. VERDI, her engines, etc., and ITALIA SOCIETA DI NAVIGAZIONE (ITALIAN LINE), as owner of S.S. VERDI,

Petitioner.

ITALIA SOCIETA DI NAVIGAZIONE (ITALIAN LINE),

Petitioner,

against

S.T. PENTELIKON, her engines, etc., and MAROCEANO, COMPANIA NAVIERA S.A.,

Respondent.

RESPONDENT'S SUPPLEMENTAL MEMORANDUM

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IN THE

Supreme Court of the United States

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No. 1816

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Respondent.

RESPONDENT'S SUPPLEMENTAL MEMORANDUM

Petitioner's quotations from the testimony of the Master of the *Pentelikon,* Nicholas Hazapis, cover three and one-half pages of its Reply Memorandum. Captain Hazapis' testimony on examination before trial and as a witness at the trial covers some 296 pages of transcript. The distorted effect Petitioner's selection process creates is well-illustrated by the selection of the questions and answers in

the middle of Page 6 of the Reply Memorandum. The final answer "*Both*", which by its emphasis Petitioner appears to believe established that Captain Hazapis "*then* thought" the *Verdi* could no longer avoid collision by her actions alone, was followed by this question and answer:

> "Q. Before that time, at 0137 when you flashed the 'U' the first time, did you have in mind that the Verdi could stop or change course to avoid collision all by herself? A. If the Verdi in that time changed the course starboard, it was clear vessel, *and also the second time when I blow.*" (Verdi's Exhibit AG, Deposition of Nicholas Hazapis, Page 136. Emphasis Added).

Respectfully submitted,

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